

SEP 29 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6011
DATE COMPLAINT FILED: May 12, 2008
DATE OF NOTIFICATION: May 19, 2008
LAST RESPONSE RECEIVED: June 19, 2008
DATE ACTIVATED: July 1, 2008
EXPIRATION OF SOL: May 2, 2013

COMPLAINANT: Kenneth H. Hooks, III

RESPONDENTS: Darrell Glasper
Friends of Michael Jackson
Unknown Persons

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. § 434(b)
2 U.S.C. § 441h
2 U.S.C. § 441d
11 C.F.R. § 100.22
11 C.F.R. § 100.26
11 C.F.R. § 100.27
11 C.F.R. § 110.11(a)(2)
11 C.F.R. § 110.16(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

1. INTRODUCTION

The complaint alleges that Darrell Glasper, Friends of Michael Jackson and unknown persons initiated fraudulent mass telephone calls ("robo-calls") to African-American households asking voters to stay home and not vote in the May 3, 2008 special federal election for the open Sixth Congressional seat in Louisiana in order to teach the Democratic Party a lesson for supporting Don Cazayoux instead of Michael Jackson in the special primary run-off election.

1 The robo-calls concluded with the statement "Paid for by Friends of Michael Jackson." The
2 complaint included an affidavit from Michael Jackson denying that he had permitted any person
3 or group to use his name for purposes of the calls. In his response, Darrell Glasper provided an
4 affidavit stating that he, on his own initiative, is responsible for the robo-calls, had paid for them
5 with his own funds, and had not worked in conjunction with or at the behest of Michael Jackson
6 in connection with them. As set forth in more detail below, we recommend that the Commission
7 dismiss the complaint with admonishment. Although the facts alleged do not make out a
8 violation of fraudulent misrepresentation within the meaning of 2 U.S.C. § 441h, it appears that
9 admonishment is warranted because Mr. Glasper failed to include the proper disclaimer in the
10 text of the robo-calls and to disclose the cost of those calls as an independent expenditure in a
11 report filed with the Commission.

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 **A. Facts**

14 In January 2008, Congressman Richard Baker from Louisiana's Sixth Congressional
15 District announced that he was resigning from Congress, effective February 15, 2008. The State
16 of Louisiana held a special primary election on March 8, 2008 to choose the Democratic and
17 Republican nominees for the unexpired term of Congressman Baker, which led to special runoff
18 elections for both parties on April 5, 2008. Don Cazayoux defeated Michael Jackson in the
19 special runoff to become the Democratic candidate in the May 3, 2008 special general election,
20 where he defeated Woody Jenkins, his Republican opponent. As winner of the special general
21 election, Representative Cazayoux will serve the remainder of Congressman Baker's term ending
22 in January 2009, but the seat is up again in the regular November 2008 general election for a
23 two-year term.

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1 The complaint states that on May 2, 2008 and on the morning of the May 3, 2008
2 election, Darrell Glasper, representing himself as a group called "Friends of Michael Jackson,"
3 initiated robo-calls to African-American households asking voters to stay home and not to vote
4 in the May 3, 2008 special general election. According to the complaint (and not disputed by the
5 response), the robo-calls stated:

6 I'm very upset that the National Democratic Party favored Don Cazayoux
7 from New Roads over Michael Jackson. The Democratic Party raised
8 \$850,000 for Don Cazayoux which is the only reason Michael Jackson lost in
9 the Democratic runoff. The National and State Democratic Parties always
10 seem to back the white democrat over the black democrat and that's wrong. A
11 lot of us who are supporting Michael Jackson feel the National Democratic
12 Party need to be taught a lesson. We're not voting for Don Cazayoux because
13 we believe Woody Jenkins will be a lot easier to beat in November when
14 Senator Barack Obama is on the ballot. You haven't heard many black
15 elected officials supporting Don Cazayoux. On Saturday we're going to stay
16 home and see how the National Democratic Party do without us. Paid for by
17 Friends of Michael Jackson.

18
19 Included as Exhibit 1 to the complaint is a handwritten affidavit signed by Michael
20 Jackson which states:

- 21 1. On May ___, (blank in the original), affiant has been informed
22 that mass telephone calls invoking affiant's name, requesting that voters
23 not vote today (sic).
24
25 2. Affiant has not authorized the use of his [name] for these purposes and
26 supports all lawful attempts to immediately stop these calls.¹
27

28 The complaint also includes a May 6, 2008 article from "*The Advocate*," a Louisiana
29 newspaper, in which Mr. Glasper reportedly admits to recording the calls under the name

¹ Mr. Jackson's handwritten affidavit apparently was originally submitted in support of a petition for a temporary restraining order filed on May 3, 2008 by Christopher Whittington, Chairman of the Louisiana Democratic Party, asking a Louisiana court to "restrain any and all parties . . . from the further use of Representative Michael Jackson's name . . . for the purposes of denying voters their . . . right to vote." The court's order and petition for a temporary restraining order are attached as exhibits to the complaint. On May 3, 2008, Judge Janice Clark of the 19th Judicial District Court of Louisiana issued a temporary restraining order restraining the further use of Representative Michael Jackson's name without his prior approval for the purposes of denying voters their constitutionally protected right to vote.

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1 "Friends of Michael Jackson," states that the message was sent to 10,000 telephone numbers
2 before Mr. Jackson asked him to stop, and that he had planned for the message to reach 60,000
3 telephone numbers. In addition, the article reports that Michael Jackson said he had nothing to
4 do with the robo-calls. Finally, the complaint includes a notarized statement from Mr. Trey
5 Ourso, who states that he was present when Parish Attorney Wade Shows called Mr. Glasper on
6 May 3, 2008, and Mr. Shows reported that Mr. Glasper stated he took responsibility for the calls,
7 that Michael Jackson had called him demanding that the calls be stopped, and that he stopped the
8 calls "because they never sent the money." According to Mr. Ourso's statement, Mr. Glasper
9 would not tell Mr. Shows from whom he was expecting payment. See discussion *infra*.

10 While not addressed by either the complaint or the response, the May 6, 2008 article from
11 "*The Advocate*," submitted with the complaint, also reports that Michael Jackson said he would
12 run for the Sixth Congressional District seat when it comes up again in November 2008. See
13 also John McGinnis, *Louisiana Black Candidates Might Go Independent*, Bayou Buzz.com (May
14 7, 2008) (reporting that Michael Jackson is running television commercials declaring to his
15 supporters that he is running again in the fall). Thus, around the time of the robo-calls, Michael
16 Jackson was publicly declaring himself a candidate in the upcoming general election. On July
17 11, 2008, Mr. Jackson filed to run as an Independent for Louisiana's Sixth Congressional seat in
18 the November 2008 general election. Furthermore, the August 28, 2008 edition of the *Roll Call*
19 newspaper quotes Michael Jackson as blaming his loss in the Democratic primary runoff on the
20 Democratic Congressional Campaign Committee's favoritism toward Don Cazayoux.

21 In response to the complaint, Darrell Glasper submitted an affidavit averring "[o]n my
22 own initiative, I chose to employ a telephone bank for the purposes of voicing my displeasure
23 with the Democratic party's lack of support for Mr. Jackson . . . and expressly authorized a

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1 message which summarized my displeasure with the National Democratic Party... [that was]
2 sent telephonically to a number of households within the Sixth Congressional District." Further,
3 Mr. Glasper avers that "the decision to place these phone calls was my own personal decision,
4 and I did not act for or on behalf of any candidate in the general election . . . I did not work in
5 conjunction with or at the behest of Michael Jackson. . . . [and] the full and complete totality of
6 my efforts were of my own personal volition." Mr. Glasper also states in his affidavit that he did
7 not receive any contributions from others with regard to the robo-calls, that his expenditures
8 were less than \$1,000, that he did not operate any corporation or other entity in making the calls,
9 and that he specifically did not create an entity known as "Friends of Michael Jackson."²

10 In a letter from counsel accompanying the affidavit, Glasper argues that the robo-calls
11 "simply advised recipients that certain supporters of Mr. Michael Jackson (e.g., friends of
12 Michael Jackson)" planned to teach the Democratic Party a lesson by not voting for the
13 Democratic candidate in the general election. Mr. Glasper further argues that his right to make
14 these calls is protected under the First Amendment because as a private citizen not acting on
15 behalf of any candidate, he chose to engage in the political process by apprising other voters of
16 his views through use of a telephone bank. Therefore, he requests that the Commission dismiss
17 this matter.

18 **B. Legal Analysis**

19 The facts alleged in the complaint implicate three possible violations of the Federal
20 Election Campaign Act of 1971, as amended (the "Act"): fraudulent misrepresentation of

² It does not appear that "Friends of Michael Jackson" was ever an actual entity. According to Commission records, Michael Jackson originally filed his Statement of Candidacy form on January 15, 2008 and identified the name of his committee as Jackson for Congress. There is no political committee registered with the Commission named Friends of Michael Jackson. Counsel for Mr. Glasper states that he is not representing the respondent identified as "Friends of Michael Jackson."

1 campaign authority (2 U.S.C. § 441h), an inadequate disclaimer (2 U.S.C. § 441d(a)), and an
2 unreported independent expenditure (2 U.S.C. § 434(c)).

3 Mr. Glasper does not appear to have violated section 441h(a)(1), which prohibits any
4 person who is a candidate or an employee or agent of such candidate from fraudulently
5 misrepresenting himself as speaking, writing, or acting for or on behalf of another candidate or
6 political party on a matter that is damaging to that candidate or party. Mr. Glasper was not a
7 candidate in the May 2008 special general election or the November 2008 general election, and
8 there is no information that Michael Jackson or his campaign employed Glasper or that he was
9 Jackson's agent for purposes of the robo-calls.³ Most importantly, Mr. Glasper did not purport to
10 speak or act on behalf of another candidate or political party, including Democratic candidate
11 Don Cazayoux, Republican candidate Woody Jenkins, the National Democratic Party, or any
12 other political party on any matter at all. Nor does it appear that Mr. Glasper violated section
13 441h(b)(1), which prohibits any person from fraudulently misrepresenting the person as
14 speaking, writing or otherwise acting on behalf of any candidate or political party or agent
15 thereof for the purpose of soliciting contributions or donations, because the robo-calls did not
16 solicit any contributions or donations for Jackson's campaign.⁴ Although Mr. Glasper does not
17 appear to have fraudulently misrepresented campaign authority within the meaning of 2 U.S.C.

³ We considered the possibility that Jackson may have coordinated the robo-calls with Glasper because Jackson knew that he would be running in the general election in November 2008 and the robo-calls were aimed at preventing a Democratic incumbent in that election. In addition, Glasper reportedly stated that the calls stopped because "they never sent the money," but would not identify the source of the expected funds. However, Jackson signed an affidavit stating that he did not authorize the use of his name for purposes of the calls, and Glasper averred that that he did not act for or on behalf of any candidate in the general election, and specifically, that he did not work in conjunction with or at the behest of Michael Jackson. We have no information to the contrary. Thus, we do not have sufficient information to recommend an investigation into possible coordination between Jackson and Glasper.

⁴ The statement in Mr. Ourso's declaration, submitted with the complaint, that Mr. Glasper stopped the calls "because they never sent the money," appears to refer to a failed expectation that others would help pay for the robo-calls, not to a scheme to solicit money through the calls themselves.

§ 441h, it appears that he violated the disclaimer and independent expenditure provisions of the Act. We discuss these apparent violations below.

1. Failure to include the proper disclaimer

Whenever any person makes a public communication that expressly advocates the election or defeat of a clearly identified candidate, the communication must include a disclaimer. 2 U.S.C. § 441d(a), 11 C.F.R. § 110.11(a)(2). Such a communication not authorized by a candidate, authorized committee of a candidate, or an agent of either of the candidate or authorized committee, must contain a disclaimer that clearly states the full name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). A public communication includes a communication by telephone bank to the general public. 11 C.F.R. § 100.26. A telephone bank means that more than 500 calls of an identical or substantially similar nature were made within a 30-day period. 11 C.F.R. § 100.28.

As noted previously, Mr. Glasper reportedly stated that 10,000 robo-calls were made to households in the Sixth Congressional District of Louisiana. If accurate, the robo-calls meet the definition of a public communication because they were identical or essentially similar, numbered in excess of 500, and took place over a two-day period. Thus, the calls would have required a disclaimer if they expressly advocated the election or defeat of a clearly defined candidate.

Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger U.S. Senate in Georgia,

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1 "Smith for Congress," "Vote Pro-Life" or "vote Pro-Choice," accompanied by a listing of clearly
2 identified candidates described as Pro-Life or Pro-Choice," "Vote against Old Hickory," or
3 "reject the incumbent," or uses campaign slogans or words that in context have no other
4 reasonable meaning than to urge the election or defeat of one or more clearly identified
5 candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One,"
6 "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v.*
7 *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL") ("[The publication]
8 provides in effect an explicit directive: vote for these (named) candidates. The fact that this
9 message is marginally less direct than "Vote for Smith" does not change its essential nature.").
10 The second part of this regulation encompasses a communication that, when taken as a whole or
11 with limited reference to external events, "could only be interpreted by a reasonable person as
12 containing advocacy of the election or defeat of one or more clearly identified candidate(s)
13 because" it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of
14 only one meaning" and "reasonable minds could not differ as to whether it encourages actions to
15 elect or defeat one or more clearly identified candidate(s) or encourages some other kind of
16 action." See 11 C.F.R. § 100.22(b).

17 Although a close call, we conclude that the robo-calls expressly advocate the defeat of
18 Don Cazayoux within the meaning of Sections 100.22(a). The calls focus on the special general
19 election between Don Cazayoux and Woody Jenkins. Section 100.22 (a) provides that a
20 communication "expressly advocates" the election or defeat of a candidate if it "uses phrases
21 such as ... "Vote Pro-Choice" or "vote "Pro-Choice" "accompanied by a listing of clearly
22 identified candidates identified as Pro-Life or Pro-Choice." In an analogous manner, the robo-
23 calls here contain an imperative and then tell the voter what electoral action with respect to a

1 clearly identified candidate will meet that imperative. After setting forth the imperative-- the
2 "need" to teach the Democratic Party a lesson for not supporting Michael Jackson, Cazayoux's
3 opponent in the Democratic primary runoff, the robo-calls provide the model for accomplishing
4 the goal: "We're not voting for Don Cazayoux" and "On Saturday we're going to stay home and
5 see how the National Democratic Party do without us." These words can, in context, have no
6 other reasonable meaning than to urge voters not to participate in the special election so that Don
7 Cazayoux will lose, and the National Democratic Party will thereby be taught the lesson it
8 "needs." As in *MCFL*, although the message is "marginally less direct than" don't vote for Don
9 Cazayoux, that "does not change its essential nature." *MCFL* at 249. Thus, the calls meet the
10 requirements for express advocacy under section 100.22(a).

11 In addition, the calls meet Section 100.22(b) as the references to the candidates in the
12 special general election and primary runoff and to the upcoming general election in November
13 are entirely electoral in nature, and the clear message of statements in the text such as "A lot of
14 us who are supporting Michael Jackson feel the National Democratic Party need[s] to be taught a
15 lesson" and "We're not voting for Don Cazayoux because we believe Woody Jenkins will be a
16 lot easier to beat in November when Senator Barack Obama is on the ballot," is for voters to stay
17 home for the special general election instead of voting for Don Cazayoux so that his Republican
18 opponent will be elected and Michael Jackson will have a better chance of winning in November.
19 Thus, reasonable minds could not differ as to whether the robo calls were for the purpose of
20 defeating Don Cazayoux. When taken as a whole, the text of the robo-calls is "unmistakable,
21 unambiguous, and suggestive of only one meaning:" defeat Don Cazayoux by staying home and
22 not voting for him in the May 3, 2008 special election.

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1 Because the robo-calls were public communications that contain express advocacy, the
2 calls should have contained the appropriate disclaimer for communications not authorized by a
3 candidate, authorized committee of a candidate, or an agent of either of the candidate or
4 authorized committee. Since they did not, it appears that Darrell Glasper violated 2 U.S.C.
5 § 441d(a).

6 **2. Failure to report independent expenditure**

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8 Because the robo calls expressly advocated the defeat of Don Cazayoux, and Darrell
9 Glasper averred in his affidavit that he acted alone in sponsoring them, the costs of the robo-calls
10 are independent expenditures. See 2 U.S.C. § 431(17). Under the Act, every person that is not a
11 political committee who makes independent expenditures aggregating in excess of \$250 with
12 respect to a given election in a calendar year is required to timely file an FEC Form 5 that
13 contains reporting person's name, mailing address, occupation, name of employer, if any, the
14 name and address of the person to whom the expenditure was made, the amount, date, and
15 purpose of the expenditure, a statement that indicates whether such expenditure was in support
16 of, or in opposition to a candidate, with the candidate's name and office sought, and a verified
17 certification under penalty of perjury as to whether such expenditure was made in cooperation,
18 consultation, or concert with, or at the request or suggestion of a candidate, a candidate's
19 authorized committee, or their agents, or a political party committee or its agents. See 2 U.S.C.
20 § 434(c); 11 C.F.R. § 109.10(c) and (e). While Mr. Glasper averred that he spent less than
21 \$1,000 (and received no funds from others) for the calls, it appears that his costs likely exceeded
22 \$250, requiring the filing of an independent expenditure report.⁵ To be timely, Mr. Glasper's

⁵ Mr. Glasper's counsel, in his response, maintains that 2 U.S.C. § 434(c) is not applicable because although his client made in excess of \$250 in independent expenditures, he did not receive any contributions from any person or entity towards the costs of the robo-calls. See response at 3. This is a misreading of the applicable statute and

independent expenditure report should have been filed with the Commission by July 15, 2008.

To date, he has not filed such a report in violation of 2 U.S.C. § 434(c).

3. Conclusion

Although Mr. Glasper apparently violated 2 U.S.C. §§ 441d(a) and 434(c), we do not recommend that the Commission pursue these apparent violations to investigation or conciliation because it appears the cost of the robo-calls was relatively low. Mr. Glasper submitted an affidavit averring that he spent less than \$1,000 on the robo-calls. We have no evidence that he paid more than \$1,000, and publicly available information indicates that robo-calls can be as inexpensive as 2 cents per call to 4 cents per call. See Dennis Cauchon, States try to pull plug on 'robo-calls,' *USA Today*, January 18, 2008, at 1a. At such prices, the cost for making the calls to 10,000 telephone numbers would have been \$200 to \$400.

regulations because persons other than political committees must report expenditures in excess of \$250 for a given election regardless of whether contributions from other persons are received.

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9 Therefore, we
10 recommend that the Commission dismiss the complaint as to Darrell Glasper, send him an
11 admonishment letter for his apparent violations of 2 U.S.C. § 434(c) and 2 U.S.C. § 441d, and
12 close the file as to him. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Furthermore, as there does
13 not appear to be any group of individuals or entity known as Friends of Michael Jackson
14 involved in the robo-calls, we recommend that the Commission dismiss the complaint as to
15 Respondents Friends of Michael Jackson and Unknown Persons and close the file as to them.

16 **III. RECOMMENDATIONS**

- 17 1. Dismiss the complaint as to Darrell Glasper, Friends of Michael Jackson, and
18 Unknown Persons.
19
20 2. Send an admonishment letter to Darrell Glasper regarding apparent violations of
21 2 U.S.C. §§ 434(c) and 441d(a).
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23 3. Approve the attached Factual and Legal Analysis for Darrell Glasper.
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25 4. Approve the appropriate letters.

5. Close the file as to all Respondents.

Thomasenia P. Duncan
General Counsel

September 29, 2008
Date

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